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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 214

FORT STREET UNION DEPOT COMPANY,
Petitioner

vs.

MARGARET M. HILLEN, as Special Administratrix of the Estate of Samuel Hillen, Deceased,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The unexpected and unfounded assertion of respondent's counsel on page 4 of their brief that the question whether defendant is a common carrier was not in the case because of the following quotation from the trial judge's charge, makes this reply necessary:

> "Counsel, I assume, concedes that they are a common carrier. However, counsel may object later on if that is not so—from the expression on counsel's faces. I will say this, that if counsel do not accept what the court says—but you accept it." (R. 141).

The point that defendant was not a common carrier was briefed and argued by both sides in the Circuit Court of

Appeals without any reference to this language of the trial judge.

It is significant that counsel make no claim for the language of the trial judge. They merely quote what the trial judge said and apparently trust that one reading the matter would draw the inference that there was a waiver of the point in the lower court. This is not the fact. The point was argued before the trial judge on defendant's motion for judgment non obstante veredicto (R. 164), and was briefed and argued by both sides in the Circuit Court of Appeals and there decided by the Circuit Court of Appeals adversely to defendant's contention.

When the trial judge discerned from the expression on counsel's faces that no such concession was made or intended, he turned to the jury and peremptorily instructed the jury to consider that the defendant was a common carrier, and when the court said "but you accept it," he was addressing the jury.

Whether depot companies which are not terminal railroad companies are common carriers has never been decided by this court. If the test of a common carrier, as stated in *Union Stock Yard Co. v. U. S.*, 308 U. S. 213, 220, the case relied on by counsel for respondent, is applied, then it must be said that defendant is not a common carrier railroad, and, therefore, not within the provisions of the Federal Employers' Liability Act.

The Safety Appliance Act

Plaintiff's decedent was not engaged in the handling of a car claimed to be defective. Plaintiff's claim is that he was injured by a defective grab-iron attached to another car which was standing still on another track. The question whether in this situation the so-called Safety Appli-

ance Act applies so as to relieve the plaintiff from the necessity of establishing negligence is new and has never been decided by this court. In *Davis v. Wolfe*, 263 U. S. 239, cited by respondent, the person injured was making use of the grab-iron claimed to have been defective. In the case of *Minneapolis R. Co. v. Gotschall*, 244 U. S. 66, cited by respondent, automatic couplers broke apart during the operation of a train and an employee on the train was thrown to the ground and injured. In the case of *Fairport v. Meredith*, 292 U. S. 589, cited by respondent, it was held that the provision of the act which required power brakes was for the benefit of travelers on the highway, because the obvious purpose of power brakes was to enable a train to stop quickly and efficiently. These cases in no way overrule the holding of this court in *St. Louis, etc. R. Co. v. Conarty*, 238 U. S. 243, where recovery was denied because he was not handling or riding on the car which it was claimed had a defective coupler.

Speculation and Conjecture

In their reply brief, counsel for respondent deny that the judges joining in the majority opinion of the Circuit Court of Appeals assumed the existence of facts in support of their opinion as claimed by petitioner in its petition for writ of certiorari.

1. The majority of the Circuit Court assumed that the porter "walked four times along the narrow strip of rough, wet ground between tracks numbers 6 and 7 * * *" (R. 178). There is absolutely no testimony whatsoever supporting this assumption. It was obvious that the porter descended from the car and crossed immediately to the supply room (R. 189).

2. The majority opinion of the Circuit Court of Appeals states that the jury may have considered it incredible that the porter used both hands in getting up into the car with his towels and supplies (R. 178). There is no support whatsoever in the record for the assumption that the porter held onto his bag of laundry instead of tossing it on the vestibule platform (R. 189).

Circuit Judge Hicks, in the dissenting opinion, concerning the testimony of the porter and conductor, said:

> "Their testimony was not discredited by any test of which I am aware. No statement of theirs was involved in any inconsistency or discrepancy upon any material matter." (R. 181-182).

3. It was undisputed that a piece of one of the bolts which held the grab-iron was found on the ground at the point of the accident newly sheared off. In disposing of this undisputed proof, the Circuit Court of Appeals conjectured:

> "While there seems to have been an agreement that a part of one of the bolts which had been newly broken or sheared off was found at the scene of the accident, in the light of the testimony of appellee's witnesses, the jury could have adopted the inference that the bolt had been broken some time before and that the part discovered merely failed to drop off out of its socket until the car was placed where the accident occurred, or thereafter." (R. 188, 179).

There is not a single word of testimony in the record which would support, even remotely, any such assumption, and its indulgence in the case at bar is contrary to the rule of the Circuit Court of Appeals for the Sixth Circuit itself. *Parker v. Gulf Refining Co.*, 80 Fed. (2d) 795. In this case the court, speaking through Judge Simons, held

"To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial."

The Grab-Iron in Question

Counsel for respondent, on pages 2 and 4 of their brief, state that after plaintiff's decedent was struck it was found that a grab-iron "on the car on the adjoining track was not fastened to the car." Expressed in this way, it conveys the suggestion that the car was in this condition before the accident. As stated by Judge Hicks in the dissenting opinion, the obvious fact is that the grab-iron broke when Hillen's body struck against it. Of course, the grab-iron was found broken after the accident and the undisputed proofs established that it was in good condition up to the moment of the accident.

Defendant's yardmaster testified (R. 81) that immediately after the accident occurred he found the grab-iron bent towards the east and twisted in on the inside of the vestibule steps, and that he straightened it as well as he could pending repairs. Plaintiff's witness testified that at some indefinite time after the accident had occurred, and after he had engaged in other work, he observed the grab-iron, and at that time found it protruding from the car four or five inches and bent slightly towards the east (R. 30-31).

These two stories were not in contradiction. They both stated the truth and both should have been believed in the trial court and the Circuit Court of Appeals should have so held as a matter of law. Obviously, defendant's witness placed the grab-iron in the condition in which plaintiff's witness testified that he found it (R. 186). The Circuit Court of Appeals, however, held:

> "The jury evidently disbelieved appellant's testimony that the grab-iron was twisted on the inside of the steps and believed appellee's story that the grab-iron was bent outward towards the other track a distance of 4 or 5 inches, and a little toward the east. It was the function of the jury to decide which of these stories it would accept." (R. 178).

If the majority opinion of the Circuit Court of Appeals is right in the case at bar, then it must be said that in every case where an appliance is found broken at some indefinite time after an accident, and the undisputed, credible, and unimpeached testimony established that it was in good condition at the moment of the accident, a trial judge may nevertheless permit the jury to disregard such testimony and find as a fact that the appliance was defective before the accident.

Plaintiff's counsel point to the fact that the trial judge in the case at bar charged the jury that plaintiff must establish a case by a preponderance of evidence, etc. They have misconceived the point presented. A defendant is entitled to a directed verdict when the plaintiff has failed to sustain the burden of proof, and in the determination of this question, the trial judge may not abdicate in favor of a jury.

It is respectfully submitted that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

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